Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

80-1171

No. _____

In The Supreme Court of the United States

October Term, 1980

PETER J. ABDELLA, Petitioner
v.
SHAWANO LAKE SANITARY DISTRICT No. 1, CARL CARMICHAEL, EARL LUNDMARK and MAYNARD LABUTZKE
Respondents

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT OF THE THIRD DISTRICT COURT OF APPEALS FOR THE STATE OF WISCONSIN ENTERED IN THE ABOVE CASE ON JULY 28, 1980

PETER J. ABDELLA
Petitioner Per se
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Phone (715) 526-5530

GERALD L. KOENIG
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Counsel for defendants

QUESTIONS PRESENTED

.Where fraud had been properly alleged as well as discrimination, and where the action had timely been commenced, which action is a question of fact for a jury and not a question of law, did the Third District Court of Appeals in affirming the Summary Judgment of the trial court deny petitioner of his constitutional rights as provided for in Article Fourteen of the Constitution of the United States, Section 1, and Article 7. As well as the Constitution of the State of Wisconsin Section 9 and as provided for in the 1871 Federal Civil Rights Laws?

And can a statement made by defendant attorney in a motion for dismissal of the action become the basis of the conclusion that the action is frivolous, again sepriving petitioner of a question of fact for a jury trial, and not a question of law.

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is appended to this Petition as Appendix "B". (Not Published)

The Order of the Wisconsin Supreme Court Docket No. 79-1840, Dated November 10. 1980. A copy is appended to this Petition as Appendix "C"

OPINION"S BELOW

The memorandum decision and order of the Circuit Court in the case of Peter J. Abdella versus Shawano Lake Sanitary District No. 1, Carl Carmichael, Earl Lundmark and Maynard Labutzke Docket No. 79-1840. A copy is appended to this Petition as Appendix "A" Dated 9/21/79

The Order and Decision of the 111 District Court of Appeals , Docket No. 79-1840, has not been reported, a copy

JURISDICTION

The order of the Third District Court of Appeals for the State of Wisconsin, was entered July 28, 1980, and a copy thereof is appended to this Petition as Appendix "B" . The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257.

CONSTITUTIONAL PROVISION'S AND STATUTE'S INVOLVED

The Seventh Amendment to the United States Constitution

WISCONSIN CONSTITUTION

Section 5 (As amended Nov,1922)

Trial by jury in civil cases.

Section 9. Remedy for wrongs.

FEDERAL CIVIL RIGHTS ACT (1871)

WISCONSIN STATUTES

Wisconsin Stats., 66.60 (12) (e)

Wisconsin Stats., 60.309 (1) (g)

Wisconsin Stats., Sec. 893.19 (7)

Wisconsin Stats., 814.025

Pertinent text of above appended to this Petition as Appendix (D)

STATEMENT OF THE CASE

A Summons and Complaint was filed in the office of the Clerk of Court, of Shawano County, Wisconsin, on the 9th day of March, 1979, and proper service was made on all parties concerned.

The action was pursuant to Wis. Stats., 66.60 (12) (e) which states:

> "The limitation provided for in par. (a) shall not apply to appeals based on fraud, or upon latent defects in the construction of the improvements discovered after such period." (R. p. 25.

Upon discovery of the fraud on or about July 1, 1977, plaintiff repeatly asked the District commissioners to investigate and correct the damages resulting from the fraud (R. p.25-26)

The Complaint alleged "By virtue of Fraud, Malice and Discrimination, plaintiff was asking for proper damages which resulted to him." (R. 1-4)

The Shawano Lake Sanitary District and its Commissioner's in a fraudulent excerise of their powers under Wis. Stats., Sec. 60.309 and 66.60 in levying special assessments which required:

> "Whereas, the commissioners have examined the entire area to be improved and have severally AND SEPERATELY considered each parcel of real estate for the purpose of making assessments there against in an aggregate amount equal to the determined cost of the work to be done.

The Complaint alleged that plaintiff had been assessed for 8 vacant lots while in truth there were but four asseassable lots.Also on another parcel of land which the ordinance called for an $1.800.00 assessment plaintiff was assessed $3.000.00

Defendants March 30. 1979, filed Notice of Motion and Motion to Dismiss citing Wis. Stats and rules of Civil procedure which were not appliciable

(R. p. 23-24) will show how the federal questions sought to be reviewed were raised in the lower court; there was no ruling on these questions in the lower court:

CORPUS JURIS SECUNDUM

Defines fraud as:

"While the broad outlines of fraud have been indicated by regarding it as including any cunning, deception or artifice use, in violation of a legal duty or equitable duty, to circumvent, cheat, or deceive another.

CORPUS JURIS SECUNDUM (5) 37 C.J.S. page 220.

"Except where the action is brought under a valid and applicable statute relating to transactions of a certain class, the elements of actionable fraud are the same regardless of the nature of the transaction in which the fraud is alleged to have been committed; but, in determining the presence or absence of such eleements, it may be necessary to consider the situation of the parties and the subject with which they are dealing."

It continues:

Fraud taints and vitiates everything it touches. 67. Whatever form it may assume, the law furnishes a remedy

therefor when it is exposed. 68.

PROCEEDINGS: Fraud vitiates all proceedings whether practiced on party or court. Byrme v. Vandervilt, 187 N.E. 731, 46, Ohio App. 304.

VOIDABILITY: Generally fraud renders voidable everything it enters. Turner v. Edwards, 292 N.W. 257, 202 Minn. 455.

If the essential elements of actionable or remedial fraud reqisite to the particular remedy sought are present, the nature of the transaction or the subject matter of the representation is immaterial 69.

The legislature has provided a remedy

(R. p. 25) Wis. Stats., 66.60 (12) (e)

> "The limitation provided for in par. (a) shall not apply to appeals based on fraud,"

Wis. Stats., 66.60 (17) states:

> "If an special assessment or special charge levied pursuant to this section shall be held invalid or found to be unconstitutional, the governing body of such municipality may thereafter reassess such special assessment or special charge pursuant to the provisions of any applicable law."

The federal and state constitutional

questions were raised agains (R.p.26)

pursuant to an ordinance required by statute and Wis. Stats., 60.309 and 66.60 which mandated:

> "The commissioners to examine the entire area to be improved, and to seperately and individually consider each parcel of real estate, for the purpose of making assessments there against, for the purpose of making there against in an aggreate amount equal to determine cost of the work to be done".

Appellant was living in Antigo, WI. at that time and during the period of construction, the project was completed in 1976, and in July of 1977, upon returning to Shawano, discovered that as provided for by the ordinance creating special assessments, he owned but four assessable lots rather than eight.

Numerous letters, appearances at commissiion meetings in an attempt o to have the present commissioner's correct the abuse of authority by the former commissioners, finally about 18

months later a letter was received by the commission from their attorney explaining his interpretation.

On March 9. 1979, pursuant to Wis. Stats., 66.60 (12)9e) which provides as follows:

> "The limitation provided in par. (a) shall not apply to appeals based on fraud, or upon latent defects in the construction of improvements dis-discovered after such period."

Petitioner started legal action, the complaint alleging among other things:

> "That by virtue of fraud, malice, and discrimination on the part of the District and its commissioner's, that he was entitled to proper damages resulting from the fraudulant assessments.

The defendant's moved to dismiss the action citing Wis. Stats., Sec. 60.309 (1) (g) which requires that an appeal from an adverse determination be commenced within twenty days after the date of determination. The trial court concluded that sec. 66.60 (12) (e) does

not apply to the facts of the case, and further concluded that even if sec. 66.-60 (12) were applicable, Abdella's failure to comply with sec. 66.60 (12) (f) which required payment of special assessments before an action can be started required dismissal of the action.

The lower court granted a summary judgment to the defendant's dismissing the action and awared costs to the defendant's pursuant to sec. 814.025 Wis. Stats.,. The trial court also concluded that Abdella's action was not commenced within the time allowed by sec. 60.309 (1)(g), Stats. the court further found that Abdella's complaint was made with the knowledge of the applicable statute of limitations and that the action was commenced in bad faith for the purpose of harassing or mal-

iciously injuring the defendants. The court awarded defendants attorney fees and costs in the amount of $940.00

On appeal to the Third District Court of Appeals for the State of Wisconsin, this court agreed that the trail court had correctly concluded that sec. 66.60 (12) (e) does not apply to the facts of this case, agreed further with the trial court that even if 66.60 (12) (e) were applicable, then Abdella's failure to comply with 66.60 (12)(f) required dismissal of the complaint.

The Third District Court of Appeals rejected Abdella's contention that the trial courts decision violated Art. 1, par. 9 of the Wisconsin Constitution which states:

> "Every person is entitled to a cer-
> remedy in the laws for all injuries,
> or wrongs which he may receive in

his person, property, or character".

Their reasoning being this provision does not entitle litigant to remedies after the time for bringing an action has expired. Further rejecting Abdella's arguement, that questions of fact remained, this precluding a summary judgment. Giving as their reason... The facts in dispute are not relevant to the question of timeliness of the complaint.

The Third District Court of Appeals further rejected Abdella's arguement that the action was not frivolous, and that the trial court erred in awarding costs under sec. 814.025 Wis. Stats., and concluded that Abdella should have known the action was not timely, but was for the purpose of harassing or maliciously injuring the

defendants and cited the great weight and preponderance of the evidence. Reasoning the evidence showed Abdella was informed that sec. 60.309 governed this action, and that Abdella, alleged fraud, but did not state any facts to support the allegation, and continued he did not comply with the briefing requirements for appeals, and continued to impose additional attorney fee's of $100.00 because we find the issues on appeal to be frivolus and without merit.

CONCLUSION

For the reasons stated herein, the Petition for a writ of Certiorari should be granted.

Respectfully submitted,

Peter J. Abdella

PETER J. ABDELLA
Petitioner Per se

1401 Lake Dr.,
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1-(715) 526-5530

REASON FOR GRANTING THE WRIT

The Appellate Court erred in concluding the time for bringing the instant action had expired. In that the commission as Shawano Lake Sanitary District No. 1. had declared its intention to excerise its powers under Sec. 60.309 and 66,60, Wis. Stats., to levy special assessments upon various type of propery.

WIS. STATS., 60.309 SPECIAL ASSESSMENTS.

(b) The commissioners shall the examine the entire area to be improved and severally and seperately consider each pareel of real estate therein and determine the benefits to each of said parcels and make assessments thereagainst in an aggregate amount equal to the determined cost of the work to be done. Such assessments shall be made in accordance with section 66.60

66.60 SPECIAL ASSESSMENTS AND CHARGES

(12) (e) "The limitation provided for in par. (a) shall not apply to appeals based on fraud or upon latent defects in the construction of the improvement discovered after scuh period".

WISCONSIN STATUTES CHAPTER 893

Limitations of Commencement of actions and Proceedings.

Section 893.19 Wis. Stats.,

WITHIN SIX YEARS:

(7) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud".

Where the Complaint alleged:

That where the Sanitary District & its commissioners arrived at a base of 8 vacant lots (water only) with an assessment of $4.000.00 while in truth and reality there were but 4 assessable lots as a result of the fraud, malice and discrimination, all to the plaintiff's damage of $2.000.00 plus interest, penalties that may have resulted thereby".

The action was in harmony with Wis. Stats., sec. 66.60 (12) (e), the Constitution of the United States Art. 14, and the Wisconsin Constitution Art. 1. Sec. 5 and Sec. 9 and the 1871 Cic

the Wisconsin Constitution, Art. 1. Sec. 5 and Sec. 9, as well as the 1871 Civil Rights law;.

This rationale is all the more oppresive by rejecting Abdella's arguement that question of fact preclude summary judgment:

CORPUS JURIS SECUNDUM: Question of law and fact:

> "Fraud is a question of fact for the jury unless there is a failure of proof as to the esential element or the evidence is so clear as to permit of but one reasonable conclusion.

CORPUS JURIS SECUNDUM defines fraud as:

> "While the broad outlines of fraud have been indicated by regarding it as including any cunning, deception or artifice used, in violation of a legal duty to circumvent, cheat, or deceive another.

THE VIOLATION OF THE LEGAL DUTY IN THIS CASE WAS WISCONSIN STATS., 60.309 (1) (b) which mandates:

> "The commissioners to examine the entire area to be improved, and to seperately and individually consider

each parcel of real estate, for the purpose of making assessments there against in an aggreate amount equal to determine cost of the work to be done".

The defendants have never denied that Abdella was assessed for too many lots, and the Appeals Court continues to agree that Wis. Stats., sec. 66.60 (12) (e) is not applicable to the present case, notwithstanding CORPUS JURIS SECUNDUM (5) C. J. S. WAS QUOTED IN ABDELLA"S BRIEF AS FOLLOWS:

> "Except where the action is brought under a valid and applicable statute relating to transactions in which fraud is alleged to have been committed; but, in determining the presence or absence of such elements, it may be necessary to consider the situation of the parties and the subject with which they are dealing".

The court of appeals erred in not considering the situation of the parties and the subject with which they were dealing.

Wisconsin Stats., 60.309 (b) created a confidental fiduciary relationship between the parties: Black's Law Dictionary defines a confidential fiduciary As follows:

> "A person holding the character of trustee. Fiduciary or confidential relation. One founded on trust or confidence reposed by one person in the intefrity and fidelity of another. Kerrigan v. O"Mearn 71 Mont. 227, p. 819-821." 68

C.J.S. continues:

> "Fraud taints and vitates everything it touches. 67 whatever form it may assume., the law furnishes a remedy therefor when it is exposed." 68

The rationale of the Appellate Court is contrary to the rules and principles governing fraud, contrary to the Constitution of the State of Wisconsin, Art. 1 Sec. 5 which provides for trials by jury, Sec. 9 which provides a remedy for wrongs. As well as Article 14 of the Constitution of the United States

and a violation of Abdella's Civil Rights as provided for in the 1871 Civil Rights Act, part of which states:

> "Every person who, under color of any statute ...subjects or causes (anyone) to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

This broad right to sue government was confirmed by the United States Supreme Court in the Spring term of 1980, Lionel and Joline Thiboutot v. Maine.

Led by Justice William J. Brennan Jr., the Court's majority said the wording "and laws" means any federal law that bestows some legal right. The 1871 law "broadly encompasses violations of federal statutory as well as constitutional law."

Finally the Appellate Court erred in concluding the action was frivolous.

citing great weight and clear preponderance of evidence that the action was for the purpose of harassing and maliciously injuring defendants. The great weight and preponderance of evidence the Appellate court refers to, is the statement of defendants attorney Gerald Koening in his Motion to Dismiss which is as follows:

> "Plaintiff is attempting to bring this action in the "back door" by averibg fraud, and stating it is obvious that plaintiff is slandering the good name and reputation of the former commissioners by making unfounded and irresponsible general allegations of fraud."

The Abdella motion in opposition to dismiss stated:

> "This is refuted by their own admission of being charged for too many lots, but looking for loopholes to cover up their fraud.

And it continued:

> "The one hundred more or less lawsuits the District has been involved in,

attests to the fraud and attempted frauds perpretated by the commissioners, the over $100.000.00 the district spent in attorney fees in behalf of their follies, the fraud and ignorance by intent and incompetence of which Gerald Koenig, the attorney of record also received over $50.000.00 in attorney fees during this period; certainly does not attest to competency, reputation or good name.

Where fraud is a question of fact for a Jury, then, it certainly became a question of fact for a jury to determine whether the action was commenced in bad faith, and done solely for the purpose of harassing or maliciously injuring the three commissioners, or whether it is an attempt in search of justice.

APPENDIX

APPENDIX

APPENDIX A

MEMORADUM DECISION AND ORDER

Dated September 21. 1979 Case No. 79/CV/41

STATE OF WISCONSIN CIRCUIT COURT SHAWANO COUNTY.

PETER J. ABDELLA,

Plaintiff,

v.

SHAWANO LAKE SANITARY DISTRICT
MR. CARL CARMICHAEL
MR. EARL LUNDMARK
MR. MAYNARD LABUTZKE.

Defendants.

The plaintiff filed a Complaint on March 9, 1979, alleging that the defendants had "...in a FRADULENT, MALICIOUS AND DISCRIMINATELY (sic) assessed plaintiff for more vacant lots than owned by him". The defendants moved this court to dismiss the plaintiff's Cpmpalint for the following alleged defects:

1. Failure to properly plead under 802.02 (2)

2. Statute of Limitations under 60.309 (1) (g).

3. Statute of Limitations under 66.60 (12) (e). (added as the grounds for dismissal by amendment to origanal motion).

A hearing on the defendant's motion was had on Aoril 10th of 1979, and each of the parties indicated to the court that they wish to have the court consider oral and documentary evidence outside of the pleadings. Therefore, the court did receive exhibits, as well as oral arguements in the matter. The court also continued the hearing in order to receive a copy of the decision of the Third District Court of Appeals in the case of City of Green Bay v. Packerland Packing Company. case no. 78-112, dated

April 5, 1979. The plaintiff also submitted documents referred to as "Amendment to Plaintiff's Brief in opposition to Motion to Dismiss". Based o n receipt of this evidence outside the pleadings, the court will also consider this a motion for summary judgment pursuant to section 802.06 (2), wherein it states:

"If on a motion asserting the defense described in (f) to dismiss for failure of the pleading to state a claim up n which relief can be granted, or on a motion asserting the the defenses described in (h) (res judicata) or (i) (statute of limitations), matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08,

and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by s. 802.08."

Based on the pleadings and the documents received as well as the oral arguments, it appears that the Shawano Lake Sanitary District No. 1 was created under secions 60.30 and 60.304 of the Wisconsin Statutes. This is admitted by the plaintiff in his brief. The District levied a special assessment in 1973 on lots owned by the plaintiff, There never was an appeal of those assessments prior to the commencement of this lawsuit. The plaintiff admits that these assessments were in accordance with the proper statutory sections, but now claims that the assessment was fradulent, malicious and discriminatory, and

that he did not discover this alleged fraud until July 1, 1977.

The court is satisfied that the statute controlling the limitation on the time for bringing actions is set forth in 60.309 (1) (g), which provides that appeal be made within twenty days after the date of the determination of assessment made by the commissioners, a time which has long since passed. The plaintiff contends that because section 60.309 (1) (b) says that assessment should be made in accordance with sec. 66.60, that the statute of limitations and the fraud exception contained in that section should apply. However, if section 60.309 (1) (g) is to have any meaning whatsoever, then it must be deemed to be the controlling statute of limitations for special assessments under 60.309. Clearly the reference to

section 66.60 is only for the purp ose of clarifying the assessment procedure and not for the purpose of setting the appropriate appeals time.

Even if 66.60 (12) was the controlling section, the fraud alleged to have occured was discovered on July 1, 1977, certainly more than ninety days ago, It is also clear a fraud has not been properly alleged in the plaintiff's Complaint under section 802.02 (2), which requires averments of fraud to be "stated with particularity". Of course the court has already indicated that if that were the only defect the plaintiff would be allowed to amend his pleading. However, 66.12 (f) requires that before the appeal may be maintained under that section of the statutes the installments to the Sanitary District must be paid when they become due and

payable and any appeal where the payments are in default shall be dismissed. The plaintiff attempts to argue that although he has never paid the installments to the Sanitary District when due and payable, the county has paid the Sanitary District and that the plaintiff has redeemed the property just before the expiration of three years to avoid the tax sale of the properties by the county. The plaintiff cited the Packerland Packing case as being the most recent authority for the plaintiff's position that payment by the county would in effect constitute payment by the property wner under section 60.60 (12) (f) , However, a thorough review of the Packerland case does not show that there is ny discussion whatsoever of that point, It is further evidenced by Ex. two, which contains the statement from

the County Treasurers Office, which clearly indicates that the procedure followed by the plaintiff was to "redeem" the property for tax sale rather than a payment of this installment payment when due and payable.

The defendants have asked for on e further item of relief, and that is that they receive costs and reasonable attorney fees pursuant to section 814.025. That section of the Statutes provides for the assessment of costs and fees when an action is determined to be frivilous by the court. The Statute sets forth the two criteria when a court may find that an action is frivilous, and they are as follows:

> "(a) That action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for

purposes of harassing or maliciously injuring another.

(b) The party or the party's attorknew, or should have known that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

It is clear in this case that the plaintiff was aware of the problem that he feels aggrieved by back on July 1. 1977. It is further clear that the plaintiff was aware of the fact that the assessment proceedure and the appeal time were all contained in sections 60.309 of the Wisconsin Statutes. Normally a pro se party might be given the benefit of the doubt as to their knowledge of the law and the interpretation of statutes. However, this plaintiff has had a great

deal of experience and has been involved in appeals of cases on his own behalf all the way to the U. S. Supreme Court. The record also indicates that he had been advised by the attorney for the Sanitary District or by the commissioners thenselves of the statute that applied, It is apparent to the court that section 60.309 applies to the situation, that the plaintiff was aware of the fact that 60.309 applied to the situation, and that any reasonable person reading that statute would surmise that they had twenty days within which to appeal after the determinatin was made.

The court is also convinced that the action in this matter was commenced in bad faith, and it was done solely for the purpose of harassing or malici ously injuring the three commissioners.

The court notes from the plaintiff's Complaint that he has not asked that the assessment be changed, Instead, the plaintiff has asked for damages including substantial pecuniary damages against the commissioners individually for acts he boldly states were fraudulent, malicious and discriminatory. He has not set forth any facts in his Complaint which indicate and fraud, malice, or discrimination. Furthermore, the record is completely devoid of any misconduct on the part of the commissioners other than the possibility of neglect and mistake. However, the record does indicated that even neglect and mistake are denied by the commissioners, and there is no evidence to indicate even a shred of fraud. malice or discrimination. All indications on the record indicate that the Sanitary District wished to

correct any possible error, if one existed.

ORDER

Based on the court's findings above, the court orders that the above-entitled matter be dismised and the defendants are awarded statutory costs, plus reasonable attorneys fees.

It is further ordered that the attorney for the defendants submit to this court his itemization for attorneys fees, and the court will enter an order determining a reasonable amount.

Dated: Sept. 21, 1979
BY THE COURT:
/s/ Thomas G. Grover
Circuit Judge.

JUDGMENT

(Formal parts ommitted)

This action having come on for hearing on April 10, 1979, before the cpurt,

the plaintiff appearing in person, pro se; all of the defendants appearing by Aschenbrener & Koenig, S. C. by Gerald L. Koenig; testimony having been taken; briefs having been filed by both parties; an itemization of attorney fees and statutory costs having been filed; and the court having rendered its decision;

NOW, THEREFORE, on motion of Aschenbrener & Koenig, S. C. by Gerald L. Koenig, attorney for all the defendants;

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The above entitled matter shall be and is hereby dismissed, with prejudice.

2. The plaintiff shall pay statutory costs to the defendants in an amount determined to be $100.00, which amount shall be a Judgment by the Defendants against the Plaintiff.

The plaintiff shall also pay reaonable attorney fees for the Defendants in an amount determined to be $840.00 which amoount shall be a Judgment by the Defendants against the Plaintiff.

Dated:

BY THE COURT

/s/ THOMAS G. GROVER
Circuit Court Judge.

ITEMIZATION OF ATTORNEY FEES
(Sec. 814.025, Wis. Stats.)
(Formal parts Ommitted) Case No. 79/CV/41

Date	Description	Amount
3/12/79	Receive and examine Complaint	$ 40.00
3/26/79	Research re. Sec. 60.309 66.60 and fraud as related to possible motion for Dismissal	100.00
3/28/79	Dictate Dismissal Motion and related papers	50.00
4/10/79	Appearance and argument before Court on Dismissal Motion and dictate Amendment to Dismissal Motion	100.00

6/12/79	Research re. Reply Brief	120.00
6/13/79	Finish above research	50.00
6/14/79	Prepare Reply Brief	100.00
6/14/79	Finish Reply Brief and related correspondence	175.00
6/19/79	Correspondence re. Amended Brief	10.00
7/16/79	Correspondence re. request for reasonable attorney fees	10.00
9/25/79	Examine Court's decision and conferences with clients re. same	25.00
9/27/79	Prepare itemization of attorney fees, Jusgment, Statutory Costs, and related correspondence	60.00
	TOTAL ATTORNEY FEES:	$840.00

STATUTORY COSTS
(Sec. 814.04, Wis. Stats.)
Case No. 79/CV/41

(Formal parts Ommitted)

COSTS

Fees, pursuant to Section 814.04 (1) 814.03	$100.00
TOTAL STATUTORY COSTS:	$100.00

APPENDIX B

IN THE COURT OF APPEALS DISTRICT III STATE OF WISCONSIN

No. 79-1840

PETER J ABDELLA,

Plaintiff-Appelant,

v.

SHAWANO LAKE SANITARY DISTRICT No. I, CARL CARMICHAEL, EARL LUNDMARKE and MAYNARD LABUTZKE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Shawano county: THOMAS . GROVER, Judge. Affirmed.

Before Donlin, P.J. Foley, J and Dean, J.

PER CURIAM Peter Abdella appeals from a summary judgment dismissing his action and awarding costs to the defendants under sec. 814.025, Stats. The trial court concluded yhat Abdella's action was not commenced within the time allowed by sec. 60.309 (1) (g), Stats. The court further found that Abdella's complaint was made with the

lnowledge of the applicable statute of limitations and that the action was commenced in bad faith for the purpose of harassing or maliciously injuring the defendants. The court awarded the defendants attorney"s fees and costs.

The complaint, filed March 9, 1979, alleged that the defendants, pursuant to sec. 60.309 and 66.60, Stats., levied special assessments, which were published May 14. 1973. The defendants are alleged to have fraudulently, maliciously and discriminatorily assessed Abdella's land. The defendants moved to dismiss the compaaint because sec. 60.309 (1) (g) requires that the appeal from an adverse determination be commenced within twenty days after the date of determination. Abdella argued, however, that sec. 66.60 (12) (e)

permitted the appeal because it was based on fraud. The trial court correctly concluded that sec. 66.60 (12)(e) does not apply to the facts of this case. Section 60.309 (1)(b) provides that special assessments shall be made in accordance with sec. 66.60. It does not adopt the provisions of sec. 66.60 (12) relating to the time limits for appeal. To hold otherwise would make the appeal time limits provided in sec. 60.309(1)(g) meaning less.

The trial court further concluded that even if sec. 66.60(12) were applicable, Abdella's failure to comply with sec. 66.60(12)(f) required dismissal of the complaint. Uncontroverted evidence showed that Abdella had not compied with sec. 66.60(12)(f). Therefore, even if Abdella's statutory interpretation had been correct

and sec. 66.60(12) was applicable, his failure to pay the assessment required dismissal.

On appeal, Abdella argues that the trial court's decision violates art. I par. 9 of the Wisconsin Constitution: "Every person is entitled to a certain remedy in the laws for all injuries, or wrong which he may receive in his person, property, or character...". This provision does not entitle litigant to remedies after the time for bringing an action has expired.

Abdella further argues that questions of fact remain, this precluding summary judgment. The facts in dispute are not relevant to the question of timeliness. of the complaint. Dismissal is appropriate where the time for bringing an action has expired even though the

merits of the case might involve questions of fact.

Abdella argues that his action was not frivolous and that the trial court erred in allowing costs under sec. 814.025, Stats. The trial court's finding that this action was brought even though Abdella should have known that the action was not timely but was for the purpose of harassing or maliciously injuring the defendants is not contrary to the clear preponderance and great weight of the evidence. The evidence shows that Abdella was informed that sec. 60.309 governed this action, but that he chose to ignore this fact. Abdella alleged fraud, but did not state any facts tending to support his allegation. He also did not compy with briefing requirements for appeals. Under these

circumstances, costs allowed under 814.025, Stats., were appropriate. Likewise, this court will impose added attorney's fees against Abdella because we find the issues argued on appeal to be frivolous and without arguable merit.

By the Court.---Judgment affirmed. Addltional attorney's fees of $100 to respondent.

Not recommended for publicatinn in the official reports.

APPENDIX C.

SUPREME COURT

STATE OF WISCONSIN

November 10. 1980 Madison, Wisconsin

To
Peter J. Abdella
1401 Lake Dr.,
Shawano, Wisconsin
54166

Gerald L. Koenig
Aschenbrener & Koenig
208 W. Green Bay St.,
Shawano, WI. 54166

The Court today announced an order in your case as follows:

No. 79-1840 Abdella v. Shawano Lake Sanitary Dist. No. 1, et al.

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of the plaintiff-appellant-petitioner Peter J. Abdella, and considered by the court.

IT IS ORDERED that the petition is denied, without costs

/s/ MARILYN L. GRAVES
Clerk of Supreme Court.

STATEMENT OF THE CASE

In May 1973, the appointed cimmissioner's of the Shawano Lake Sanitary District, by virtue of the authority and powers granted to make special assessments by Wis. Stats., 66.60 and 60.309 did assess Appellant for eight vacant lots

APPENDIX D.

Amendment to the United States Constitution (7)

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be presrved, and no fact tried by a jury, shall otherwise re-examined in any Court of the United States, than according to the rules of the common law."

WISCONSIN CONSTITUTION
Article 1. Section 5

TRIAL BY JURY; The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount of, in controversy".

Section 9:

REMEDY FOR WRONGS. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, comfortably to the laws".

CIVIL RIGHTS ACT 1871
FEDERAL

Part of which states:

"Every person who, under color of any statute...subjects or causes (anyone) to be subjected to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

WISCONSIN STATUTES

66.60 (12) (e) which states:

The limitation provided for in par. (a) shall not apply to appeals based upon fraud or upon latent defects in the construction of the improvement discovered after such period.

60.309 Special Assessments:

(b) The commissioners shall then examine the entire area to be improved and severally and seperately consider each parcel of real estate therein and determine the benefits to each of said parcels and maek assessments thereagainst in an aggregate amount equal to the determined cost of the work to be done. Such assessments shall be made in accordance to Sec. 66.60

Section 893.19

(7) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts onstituting the fraud."

STATUTE OF LIMITATIONS SIX YEARS